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CPLR 4502(b): Spousal Privilege Does Not Extend to Conversations Which Advance Joint Criminal Activity

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subsequent retrials, she may have relied upon the fact that the case already was on the jury calendar. Because this contention was not discussed in *Gonzalez*, it may provide a vehicle for the return of the issue to the Court of Appeals in the future.

The *Gonzalez* decision represents Court of Appeals' approval of a practice already commonly employed in the lower courts.[134] The decision highlights the significance of a party's initial determination whether to demand a jury trial. Practitioners should carefully consider this question, as a failure to demand a jury or a request for a nonjury trial, in the absence of reliance upon another demand in the case, will preclude later relief under CPLR 4102(a).

ARTICLE 45 — EVIDENCE

CPLR 4502(b): Spousal privilege does not extend to conversations which advance joint criminal activity.

To preserve the confidentiality inherent in a marital relationship, CPLR 4502(b) prohibits the disclosure of "a confidential communication made by one [spouse] to the other during marriage."[135] Various public policy considerations, however, have prompted the

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[134] *See* notes 120-121 & 130 and accompanying text *supra*.

[135] CPLR 4502(b). There exists a rebuttable presumption that all communications between husband and wife are confidential and hence privileged. *See* Poppe v. Poppe, 3 N.Y.2d 312, 317, 144 N.E.2d 72, 75, 165 N.Y.S.2d 99, 103 (1957). The marital privilege applies in both civil and criminal actions, *see, e.g.*, People v. Daghita, 299 N.Y. 194, 198, 86 N.E.2d 172, 173 (1949); 5 WK&M ¶ 4502.26; and protects acts as well as words, *see* People v. Monahan, 21 App. Div. 2d 76, 78, 249 N.Y.S.2d 562, 563-64 (4th Dep't 1974) (per curiam); People v. Sullivan, 42 Misc. 2d 1014, 249 N.Y.S.2d 589 (Sup. Ct. Queens County 1964). The privilege may be waived, provided that both the husband and wife join in the waiver. People v. Wood, 126 N.Y. 249, 271, 27 N.E. 362, 368 (1891).

At common law a husband or wife was deemed incompetent to testify in any action involving the other spouse. *See, e.g.*, Wilke v. People, 53 N.Y. 525 (1873). Apparently, this common law doctrine was related to the concept that the husband and wife are a single person. The doctrine promoted the social goals of preventing perjury and preserving the stability and harmony of the family by protecting the confidence of the marriage. *See* Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 308 (1976); 74 DICK. L. REV. 499, 500-01 (1970). Although common law incompetency has been abandoned, most jurisdictions retain a marital privilege. *See, e.g.*, ALA. CODE tit. 15, § 311 (1958); KY. REV. STAT. ANN. § 421.210(1) (Supp. 1976); VT. STAT. ANN. tit. 12, § 1605 (1973).

As early as 1929, the justification for the marital privilege was questioned by commentators seeking to free suppressed testimony from what was perceived as the "law of evidence making a rather ineffectual effort . . . to stem the tide [of the breakup of the family]." Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 679 (1929). The decrease in marital stability may be attributed to many social forces, including liberal divorce laws, economic stress, and increased mobility. *See generally* Hutchins & Slesinger, *supra*, at 682-85.

courts and the legislature to carve out several exceptions to this testimonial privilege.[136] Recently, in *People v. Watkins,*[137] the Supreme Court, Suffolk County, in a case of first impression, recognized a new exception to the privilege by finding it inapplicable to communications which serve to advance a mutual criminal conspiracy.[138]

The defendants in *Watkins,* a husband and wife, were charged with conspiracy, promoting gambling, and possession of gambling records. Defendants moved before trial to suppress telephone conversations between them which had been intercepted pursuant to an eavesdropping warrant, claiming that the conversations were protected by the marital privilege.[139] Reasoning that application of the marital privilege to situations in which the husband and wife are coconspirators would be inconsistent with the "public policy which militates against suppression of discussions of on-going crimes," Justice Jaspan rejected the defendants' contention.[140] In the absence

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[136] Statutory exceptions to the confidential communication privilege include: N.Y. MENTAL HYG. LAW § 81.13(d)(3) (McKinney 1976) (civil commitment procedure for drug dependent person); N.Y. SOC. SERV. LAW § 384-b(3)(h) (McKinney Supp. 1976-1977) (commitment of child to foster care without consent of incompetent parent); N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 1975) (child abuse proceeding).

The courts presently recognize many grounds upon which the confidential communication privilege may be denied. Primary among these is the presence of a third person during the communication. People v. Melski, 10 N.Y.2d 78, 176 N.E.2d 81, 217 N.Y.S.2d 65 (1961). It has been held that even where the third person is the victim of a criminal act by one spouse, the conversation is not privileged if the victim is conscious during it. People v. Dudley, 24 N.Y.2d 410, 248 N.E.2d 860, 301 N.Y.S.2d 9 (1969); People v. Ressler, 17 N.Y.2d 174, 216 N.E.2d 582, 269 N.Y.S.2d 414 (1966). In addition, acts or words which tend to destroy the marriage relationship usually are not privileged. *E.g.,* Poppe v. Poppe, 3 N.Y.2d 312, 315, 144 N.E.2d 72, 74, 165 N.Y.S.2d 99, 102 (1957). Similarly, where the marriage itself is no longer viable, there can be no confidential relationship and hence, no privilege. People v. Dudley, 24 N.Y.2d 410, 248 N.E.2d 860, 301 N.Y.S.2d 9 (1969). In *Dudley,* the "defendant held [the] marriage together solely by fear and domination" and threatened to kill his wife if she revealed her knowledge of a crime he had committed. *Id.* at 414-15, 248 N.E.2d at 863, 301 N.Y.S.2d at 12. *But see* People v. Fields, 38 App. Div. 2d 231, 328 N.Y.S.2d 542 (1st Dep't), *aff'd mem.,* 31 N.Y.2d 713, 289 N.E.2d 557, 337 N.Y.S.2d 517 (1972) (husband's hostile acts deemed within marital bounds as stemming from jealousy rather than coercion). In People v. Allman, 41 App. Div. 2d 325, 328, 342 N.Y.S.2d 896, 899 (2d Dep't 1973), harm directed at a child was considered so destructive of the marriage as to eliminate the privilege. Finally, discussion of ordinary business matters between spouses is clearly deemed nonconfidential. Parkhurst v. Berdell, 110 N.Y. 386, 18 N.E. 123 (1888). *See* note 147 *infra.*

[137] N.Y.L.J., April 8, 1977, at 15, col. 1 (Sup. Ct. Suffolk County).

[138] *Id.,* col. 2.

[139] As a threshold determination, the *Watkins* court found that intercepted telephone communications constitute testimony, and as such, may fall under the protection of the marital privilege. *Id.,* col. 1.

[140] *Id.,* col. 2. Although the court ruled on the privilege issue, it delayed its determination of the ultimate admissibility of the conversations until they were adduced at trial. The court's

of relevant New York precedent, the court turned to the decision of the Court of Appeals for the Seventh Circuit in *United States v. Kahn*[141] for guidance.[142] Although the *Kahn* court had acknowledged society's interest in preserving the confidentiality of the marital relationship, it found that suppression of spousal conversations concerning ongoing crimes would not serve to maintain domestic harmony, but rather would offend the public interest.[143] To further support its position, the *Watkins* court drew an analogy between the marital privilege and the attorney-client privilege, which does not protect communications promoting present or future criminal activity.[144] Additionally, the court likened a criminal conspiracy to a business transaction, discussions of which are not protected by the

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refusal to resolve the admissibility question resulted from its belief that relevant facts existed which would only be revealed at trial: whether there was a third person present during the conversations, what the defendants did or did not intend to tell any other person, the significance and content of the conversations, and the location and purpose of the telephone used. *Id.*

[141] 471 F.2d 191 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974). The *Watkins* court observed that in Kentucky and Texas a husband and wife who are justifiably believed to be coconspirators are not afforded a marital privilege for statements made by either at the time of the act in question. *See* Gill v. Commonwealth, 374 S.W.2d 848 (Ky. 1964); Goforth v. State, 100 Tex. Crim. 442, 273 S.W. 845 (1925); Thompson v. State, 77 Tex. Crim. 417, 178 S.W. 1192 (1915); *cf.* United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974) (marital privilege denied where both spouses participated in unlawful enterprise); Federal Deposit Ins. Corp. v. Alter, 106 F. Supp. 316 (W.D. Pa. 1952) (confidential communications privilege does not automatically extend to those statements which further actionable fraud); Tobias v. Adams, 201 Cal. 689, 258 P. 588 (1927) (marital privilege denied husband and wife who conspired to defraud creditors).

[142] *Kahn* arose in a factual setting similar to that in *Watkins*. The *Kahn* defendants, like the *Watkins* defendants, were charged with using a telephone with intent to promote gambling. 471 F.2d at 193.

[143] *Id.* at 194. The court explained that "'[w]here both spouses are substantial participants in patently illegal activity, even the most expansive [view] of the [marital] privilege should not prevent testimony.'" *Id.*, (quoting Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 734 (1964)).

[144] The attorney-client privilege is codified in CPLR 4503. It is well established that the attorney-client privilege does not protect a communication furthering an illegal act. *See, e.g.*, People v. Farmer, 194 N.Y. 251, 87 N.E. 457 (1909). The *Watkins* court quoted *Farmer* as supporting its refusal to grant a marital privilege for conversations fostering joint criminal activity. N.Y.L.J., April 8, 1977, at 15, col. 2. In *Farmer*, the Court of Appeals stated: "[T]he seal of personal confidence can *never* be used to cover a transaction which is in itself a crime." People v. Farmer, 194 N.Y. 251, 269, 87 N.E. 457, 464 (1909) (emphasis added). Whether the *Farmer* Court intended its holding to be used in this way is questionable, but the *Watkins* court appears justified in extrapolating from the *Farmer* opinion a genuine concern on the part of the Court of Appeals that wrongdoers not escape the consequences of their actions by virtue of a "seal of confidence." Although it expressed some reservation concerning the attorney-client, husband-wife analogy because the former differs in duration and purpose, the *Watkins* court observed that the public policy behind the attorney-client privilege applies with equal force to the spousal privilege. N.Y.L.J., April 8, 1977, at 15, col. 2.

husband-wife privilege.[145]

The privilege exception recognized in *Watkins* appears consistent with existing law. Courts often state that protection is afforded all communications springing from the trust and confidence engendered by the marriage relationship.[146] This criterion would seem to include any statement made in confidence by one spouse to the other, whether confessional or conspiratorial in nature. A close examination of the cases, however, reveals that the privilege is properly applicable only to communications which "would [not] have been the subject of discussion *but for* the existence of . . . [the] relation between the parties."[147] Thus, in order to invoke the spousal privilege, it appears that the husband and wife must communicate within their roles as family members, rather than as business associates or conspirators.[148] Since *Watkins* involved a situation in which the confidential communication sprang, in reality, from the conspiracy and not from the marriage, it is submitted that the communication was beyond the privilege.[149] Moreover, the testimonial privilege

[145] *See* Parkhurst v. Berdell, 110 N.Y. 386, 18 N.E. 123 (1888) (business conversations admissible where there is no reason to suppose defendant would have been reluctant to speak in the presence of third parties); Johnson v. Johnson, 25 App. Div. 2d 672, 268 N.Y.S.2d 403 (2d Dep't 1966) (mem.) (testimony relating to defendant's visits to a physician who executed insurance claim forms not confidential). Although analogizing the business communication situation to a case involving joint criminal activity might be subject to challenge, it appears sound in this context since neither type of communication has its basis in the marital relationship. It should be noted, however, that a spouse's participation as a coconspirator or a business associate may be induced by the trust and confidence engendered by the closeness of the marital relationship.

[146] *See, e.g.*, People v. Daghita, 299 N.Y. 194, 199, 86 N.E.2d 172, 174 (1949) (communications made "in reliance upon the free and unrestrained privacy of the marital relation and the socially desirable confidence which exists" are privileged); Sheldon v. Sheldon, 146 App. Div. 430, 432, 131 N.Y.S. 291, 293 (2d Dep't 1911) (marital privilege is said to attach to communications which are expressly made in confidence).

[147] Warner v. Press Publishing Co., 132 N.Y. 181, 186, 30 N.E. 393, 395 (1892) (emphasis added). *See, e.g.*, Parkhurst v. Berdell, 110 N.Y. 386, 18 N.E. 123 (1888); Johnson v. Johnson, 25 App. Div. 2d 672, 268 N.Y.S.2d 403 (2d Dep't 1966) (mem.); Sheldon v. Sheldon, 146 App. Div. 430, 131 N.Y.S. 291 (2d Dep't 1911).

[148] *See* Sheldon v. Sheldon, 146 App. Div. 430, 131 N.Y.S. 291 (2d Dep't 1911), wherein the privilege was held inapplicable to statements made by a husband in his capacity as a physician. In People v. Daghita, 299 N.Y. 194, 86 N.E.2d 172 (1949), however, the testimony of a wife who had observed her husband bringing stolen articles into their home on several occasions was held privileged. Chief Judge Desmond, in his dissent in People v. Melski, 10 N.Y.2d 78, 84, 176 N.E.2d 81, 85-86, 217 N.Y.S.2d 65, 71 (1961), pointed out that Daghita's wife had played a true accessorial role, having accompanied her husband during one of the burglaries in question. The *Daghita* Court, however, found that the defendant's acts were confidential communications made in reliance on the marital relation. 299 N.Y. at 199, 86 N.E.2d at 174.

[149] The marital privilege at times has come under sharp attack. *See, e.g.*, Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV.

is designed to promote socially desirable goals,[150] and a joint attempt at criminality obviously is not desirable behavior; to hold conversations furthering criminal conspiracy privileged because the conspirators happen to be married would "require a finding that . . . the commission of a crime would protect and strengthen the marital bond."[151]

The marital privilege seems important in fostering communication between partners in viable marriages. Nonetheless, the judiciary should guard against attempts on the part of wrongdoers to shield themselves from prosecution by exploiting the privilege. Hopefully, the joint criminality exception fashioned in *Watkins* will help preclude misuse of the privilege without advancing its complete abolition.

CRIMINAL PROCEDURE LAW

Court of Appeals establishes standards for production of confidential informants.

In an attempt to safeguard the rights of criminal defendants without unduly impairing the state's prosecutorial function, New York courts have been developing rules concerning disclosure and production of confidential police informers.[152] In *People v. Goggins*,[153] the New York Court of Appeals held that once it is estab-

675 (1929). Critics of the privilege maintain that the loss of evidence occasioned by its application is unjustifiable in view of the uncertainty of any beneficial effect. *See id.* at 686. One student commentator has urged that rising divorce rates and declining social emphasis upon family integrity demonstrate that the effort to preserve harmony between spouses has been futile. Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 321 (1976).

[150] *See, e.g.*, W. RICHARDSON, EVIDENCE §§ 410, 428, 447 (10th ed. J. Prince 1973).

[151] People v. Watkins, N.Y.L.J., April 8, 1977, at 15, col. 2.

[152] Under the "informer's privilege," the identity of persons who impart information to law enforcement officials is protected against disclosure. *See* Roviaro v. United States, 353 U.S. 53, 59 (1957); W. RICHARDSON, EVIDENCE § 456 (10th ed. J. Prince 1973). In *Roviaro*, the United States Supreme Court recognized the value of informers to law enforcement organizations:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

353 U.S. at 59. This privilege is particularly important in narcotics violation cases. *See, e.g.*, People v. Goggins, 34 N.Y.2d 163, 176, 313 N.E.2d 41, 48, 356 N.Y.S.2d 571, 581 (1974) (Jasen, J., dissenting), *cert. denied*, 419 U.S. 1012 (1974). Nonetheless, it has been indicated that the informer's privilege should not outweigh the defendant's right to confrontation where guilt or innocence is at stake. *See* 34 N.Y. at 173, 313 N.E.2d at 46-47, 356 N.Y.S.2d at 578.

[153] 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied*, 419 U.S. 1012 (1974).